UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

PIER SIXTY, LLC,	:	
	:	
Respondent,	:	CASE NOS. 2-CA-068612
	:	2-CA-070797
AND	:	
	:	
HERNAN PEREZ, an Individual	:	
EVELYN GONZALEZ, an Individual	:	
	:	
Charging Parties.	:	

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

JACKSON LEWIS LLP
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

By: Richard D. Landau, Esq.

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

PIER SIXTY, LLC,	:	
	:	
Respondent,	:	**CASE NOS. 2-CA-068612**
	:	**2-CA-070797**
AND	:	
	:	
HERNAN PEREZ, an Individual	:	
EVELYN GONZALEZ, an Individual	:	
	:	
Charging Parties.	:	

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pier Sixty, LLC ("Pier Sixty", "the Respondent", "the Employer" or "the Company") submits this Brief in support of its Exceptions to the Decision of the Administrative Law Judge which found merit to certain allegations contained in the Amended Complaint.[1]

STATEMENT OF THE CASE

A. General Background

Pier Sixty is a high-end catering organization located at Chelsea Piers on the lower west side of Manhattan. It is a unique destination for philanthropic benefits, corporate events and personal affairs including weddings, bar and bat mitzvahs and other celebratory

[1]The Amended Complaint is barred and the Amended Complaint (and all subsequent/related formal papers issued by the National Labor Relations Board ("the Board") lacks a quorum. Specifically, under the National Labor Relations Act ("NLRA"), all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Pier Sixty reserves the right to challenge the authority of the Board and its agents or delegates at all stages of the proceeding if they continue to act in the absence of a lawfully constituted quorum.

events. There are actually two distinct areas within Chelsea Piers where Pier Sixty provides its services – one location is called Pier Sixty and the other is called The Lighthouse. Pier Sixty employs approximately 310 individuals to provide its services and the organization is divided into a number of departments – Culinary, Pastry, Stewarding, Banquet, Administrative, Sales, Accounting, Human Resources, Purchasing and Concierge. (Tr. 565).[2]

On or about September 22, 2011, a Petition was filed by Pier Sixty staff member Evelyn Gonzalez seeking to create a union to be called the Evelyn Gonzalez Union or "EGU." (GC Ex. 2(a)). Ms. Gonzalez sought to represent employees in the following job positions: Captains, Coat Check, Bartenders, Banquet and/or Wait Staff. Id. There were approximately 130 individuals in that unit. Id. An election was held on October 27, 2011 and a majority of the eligible voters cast their ballots in favor of representation by the EGU. (GC Ex. 2(c)).

B. The Unfair Labor Practice Charges

On November 9, 2011, the Charge in Case No. 2-CA-068612 was filed by Hernan Perez alleging he was terminated due to protected concerted activities. On December 15, 2011, Case No. 2-CA-070797 was filed by Evelyn Gonzalez alleging a multitude of 8(a)(1) violations by the Employer. On August 24, 2012, Region Two of the National Labor Relations Board ("the Board") issued an Amended Complaint consolidating these two cases. (GC Ex. 1).

C. The Hearing Before Judge Esposito

A Hearing on the Amended Complaint was held on October 16th, 17th, 18th, 19th and November 19th and 20, 2012 before Administrative Law Judge Lauren Esposito ("ALJ") at the Board's offices in New York, New York.

---

[2]"(Tr. __)" refers to pages in the official Transcript; "(GC Ex. __)" refers to General Counsel's Exhibits; "(R Ex. __)" refers to Respondent's Exhibits.

D. The ALJ's Decision

On April 18, 2013, the ALJ issued her Decision dismissing a number of allegations including that:

1. Between in or about September 2011 and October 2011, Respondent, by Douglas Giordano, on at least three occasions, unlawfully threatened employees with loss of the Respondent's "open door policy" if they chose the union as their collective bargaining representative.
2. In or about October 2011, Respondent, by Jeffrey Stillwell, at the Respondent's facility, threatened employees with loss of specified benefits should they choose the union as their collective bargaining representative.
3. On or about October 9, 2011, Respondent, by Luisa Marciano, at the Respondent's facility, threatened employees with discharge should they choose the union as their collective bargaining representative.
4. On or about October 24, 2011, Respondent, by James Kirsch, at the Respondent's facility, threatened employees with loss of the Respondent's "open door policy" if they choose the union as their collective bargaining representative.
5. On or about October 24, 2011, Respondent, by James Kirsch, at the Respondent's facility, threatened employees with loss of benefits should they choose the union as their collective bargaining representative.
6. On or about October 24, 2011, Respondent, by Roland Betts, at the Respondent's facility, threatened employees with loss of specified benefits should they choose the union as their collective bargaining representative.

The ALJ also found that Respondent violated the Act by:

1. Discharging Hernan Perez in violation of Section 8(a)(3) of the National Labor Relations Act ("NLRA" or "the Act");

2. Engaging in the following acts in violation of Section 8(a)(1) of the Act as alleged in the Amended Complaint and Notice of Hearing:

a. In or about October 2011, Respondent, by Douglas Giordano, at the Respondent's facility, threatened employees with loss of their current benefits should employees choose the union as their collective bargaining representative.

b. In or about October 2011, Respondent, by Douglas Giordano, at the Respondent's facility, threatened employees with discharge should they choose the union as their collective bargaining representative.

c. In or about October 2011, Respondent, by Jeffrey Stillwell, at the Respondent's facility, threatened employees with loss of business should they choose the union as their collective bargaining representative.

d. In or about October 2011, Respondent, by Chris Martino, threatened employees that collective bargaining would start from "scratch" should they choose the union as their collective bargaining representative.

e. In or about October 2011, Respondent, by Richard Martin, at the Respondent's facility, threatened employees with loss of the Respondent's "open door policy" if they choose the union as their collective bargaining representative.

f. On or about October 8, 2011, Respondent, by Robert McSweeney, at the Respondent's facility, disparately applied its "no talk" rule to discussions regarding the union.

g. On or about October 20, 201, Respondent, by Robert McSweeney, at the Respondent's facility, disparately applied its "no talk" rule to discussions regarding the union.

Respondent denies and hereby excepts to the ALJ's findings/conclusions that Respondent violated the Act.

POINT I

THE ALJ ERRED IN CONCLUDING THAT PIER SIXTY UNLAWFULLY DISCHARGED HERNAN PEREZ

Mr. Perez was fired for the following outrageous, insubordinate and unprovoked outburst he posted on his Facebook account regarding one of the Pier Sixty Banquet Managers (Bob McSweeney):

> "Bob is such a NASTY MOTHER-FUCKER Don't know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!! WHAT A LOSER!!!! Vote yes for the Union." (GC Ex. 5).

A. The Basic Facts

The facts involving Hernan Perez are straight forward. He was hired in 1998 and throughout his employment worked as a Waiter or Banquet Server for Pier Sixty out of its Chelsea Piers' location in New York City. (Tr. 156-157). As a Waiter or Banquet Server, his general responsibilities at an event included his assisting in preparing for the affair by setting dining room tables or setting-up the bar area to assure that when guests arrive, the event rooms are in pristine condition. (Tr. 158). His further regular tasks included servicing guests at his assigned table. (Tr. 158-160).

Several months before an event occurs, a Banquet Manager (there are 4) meets with the customer to arrange all facets of the affair. (Tr. 750-751). For each event, there are quite a number of individuals assigned to work. Prior to the arrival of guests, there is an initial meeting led by the manager (typically the Banquet Manager) overseeing the entire event for the evening. (Tr. 750). At that time, assignments are made for each individual Banquet Server. (Tr. 752). For instance, they will be assigned to a specific table, assigned cocktail hour duties, etc.

Id. Any unique guest needs, such as Kosher meal requests, are covered at the meeting. (Tr. 753).

The Waiter or Server has primary responsibility for tending to any needs of a guest sitting at their assigned table. (Tr. 133, 158, 371, 407, 552). Typically, for four tables there will be five servers assigned -- one to each table and a fifth person who cover for a Server when they are taking a break or otherwise away from the table attending to the needs of a guest. (Tr. 204, 752-753). This team of five will also work together at specific moments during an event such as when one of the courses of a meal is to be "plated" or served to the guests. (Tr. 83, 369, 407, 447, 551, 758). Pier Sixty prefers to have all guests at a table served simultaneously and so the team will come together table by table to plate the salad, main course and dessert. (Tr. 753-754, 758-759). The team will also come together when it is time to clear a course from the table. Id. At all other times, they are to vigilantly attend to their assigned table. (Tr. 133, 158, 371, 407, 552, 757). This means filling water glasses, pouring wine, offering other beverages, folding napkins or removing crumbs from the table. (Tr. 759, 764).

On October 25, 2011,[3] two days before the EGU election, Mr. Perez was assigned to work the "Andrew Glover" event that evening in The Lighthouse. More specifically, he was assigned to Table 25. (Tr. 286; GC Ex. 4). As described by many General Counsel witnesses, and those of Respondent, GC Ex. 4 indicates that The Lighthouse is divided into three main areas separated by staircases and/or ramps. (Tr. 80, 201, 286, 768-769). The three levels are called Barnegat, Montauk and Navesink. (Tr. 769). Barnegat is located at the highest level, Montauk is next with Navesink on the third or lowest level. (Tr. 79-80, 768-769). Mr. Perez's table (No. 25) was located on the Navesink level. (Tr. 770). Ms. Gonzalez was also working that event and was assigned to Table 23 on the Montauk level. (Tr. 77-78). Endy Lora (another Banquet

[3]All dates hereinafter refer to 2011 unless specifically stated otherwise.

Server) was assigned to Table 22 on the Montauk level. The Andrew Glover event was overseen by Assistant Director of Banquets Bob McSweeney.

It is without dispute that at approximately 7:00 p.m., just as the cocktail hour portion of the Andrew Glover event ended and guests began to enter into the Montauk, Barnegat and Navesink areas, Mr. Perez, Ms. Gonzalez and Mr. Lora, along with Servers Barbie Sanchez and Michelle Sanchez, were all standing very close to one another right at or around Table 22 on the Montauk level. (Tr. 77, 201, 638, 768). Mr. McSweeney quickly approached this group and instructed them to "spread out." Id. By their own admission, Mr. Lora and Mr. Perez took miniscule steps away from where they were – they failed to move in any appreciable fashion towards their assigned tables. (Tr. 83, 243, 769-770). Accordingly, Mr. McSweeney reiterated his directive that they spread out. Id.

Approximately 45 minutes later, Mr. Perez posted on his Facebook page the incredibly offensive diatribe against Mr. McSweeney quoted above. The Employer was able to ascertain this timeframe because the posting has a time stamp from when it was printed out indicating "share 20 hours ago!! (GC Ex. 5) The timestamp is for October 26th at 3:46 p.m. Id. Subtracting the 20 hours, it is clear the posting took place at about 7:46 p.m. on October 25th. Since all witnesses confirm that the dialogue between Mr. McSweeney and Mr. Perez and others took place approximately at 7:00 p.m., it is irrefutable that at least 45 minutes passed before Mr. Perez made his posting.

Pier Sixty became aware of the posting on October 26th when one of its Managers (Carol Gurwell) reported it to Dawn Bergman, the Director of Human Resources. (Tr. 569, 660). Significantly, the posting and the comments surrounding it were available on the public Facebook page of Mr. Perez -- not a private page limited only to this "friends." (Tr. 569. 660,

822). This was confirmed by Luisa Marciano, Corporate Director of Human Resources of Abigail Kirsch (one of the parent companies which has an ownership interest in Pier Sixty). (Tr. 822). Ms. Marciano, after learning of the posting from Ms. Bergman, went onto Facebook herself on October 26th and, although she is not a "friend" of Mr. Perez (nor was Ms. Gurwell), she was able to pull up his posting immediately. Id. This makes clear that Mr. Perez put his information out not just to his Facebook friends, but to the entire Facebook world which, in October 2011, constituted approximately 800,000,000 people. (Tr. 569-570). Also within a few days, Mr. McSweeney came to speak to Ms. Bergman, having heard through the grapevine of the posting and its content. (Tr. 572, 772-773).

B. The Investigation

Ms. Bergman and Ms. Marciano recognized the extreme nature of Mr. Perez's conduct but also were cognizant that any significant disciplinary action which may arise from the situation could have been viewed as having legal significance vis-à-vis the election to occur the very next day. (Tr. 571-572). Accordingly, they collectively decided to conduct an investigation into the posting after the election had concluded so there would be no chance that their subsequent actions (or any discipline that might flow from it) could be viewed as an effort to influence the election outcome. Id. Mr. Perez was next scheduled to work on November 1st and on that day, Ms. Bergman met with him and then many other witnesses over the next few days. (Tr. 574). Ms. Bergman took substantial notes of her investigation some of which were entered into the Hearing Record. (R Ex. 1).

1. Mr. Perez Lied Repeatedly During The Investigation

Mr. Perez overtly lied during the investigation and attempted to influence (and in some cases was successful) others to lie to Pier Sixty during the investigation. (Tr. 312-315, 483-485, 548).

Mr. Perez met with Dawn Bergman and Doug Giordano, the then General Manager of Pier Sixty, on November 1, 2011. Mr. Giordano began the meeting by showing Mr. Perez the Facebook posting. (Tr. 573). He asked Mr. Perez for an explanation of his comments. Mr. Perez seemed prepared stating that his comments directed towards "Bob" were not directed towards Mr. McSweeney because he called Mr. McSweeney "Robert." (Tr. 573-574). Ms. Bergman and Mr. Giordano did not find this statement credible since Mr. McSweeney had always been called Bob during his 3-1/2 years at Pier Sixty, his business card states the he is called Bob and Mr. Perez even referred to him throughout their discussion as Bob. Id. Mr. Giordano went so far as to point this out to Mr. Perez, especially his reference during their conversation to Mr. McSweeney as "Bob." Mr. Perez provided no response to this obvious contradiction. (Tr. 576).

Mr. Giordano and Ms. Bergman continued on in their investigation by asking Mr. Perez if he could explain how his posting did not reference Mr. McSweeney when the comments that he received in reaction to his posting all seem to reference work at Pier Sixty and Mr. McSweeney. (Tr. 574-575). Mr. Perez had no explanation. Id. Mr. Perez was then asked how or why his posting might pertain to a different "Bob," given the closing verbiage in his posting which read "vote yes for the Union." (Tr. 575). Mr. Perez's only response was that he could write whatever he wished about the Union. Id. Ms. Bergman and Mr. Giordano did not refute this right. In fact, they acknowledged it but they questioned once again why such a reference

would take place if his comments were not directed to Bob McSweeney. Id. Mr. Perez then offered a most unbelievable explanation – that he had received a phone call and/or text while at work at Pier Sixty on October 25th from some other person named Bob at another place of business, that this other Bob had cursed at him, that he had become upset and then made his posting directed towards this other Bob. Id.

Despite the complete lack of credibility to this claim, Mr. Giordano and Ms. Bergman offered Mr. Perez the opportunity to supply some "proof" of this asserted defense by asking to see either his text or phone records which would indicate he had received a call from this other "Bob." (Tr. 312-315, 575-576). Mr. Perez refused to provide information to ascertain if this call from another "Bob" occurred. Id. At that juncture, Mr. Giordano and Ms. Bergman informed Mr. Perez that he was suspended pending the outcome of the investigation. (Tr. 576-577).

2. Other Witnesses Confirm Mr. Perez's Facebook Comments Were Directed at McSweeney

Over the next several days, Ms. Bergman, along with Mr. Giordano or other managers, interviewed each of the witnesses involved. She interviewed Crystal Arnold, Roberth Ramirez, Esther Martinez, Evelyn Gonzalez and Shawn Tremblay. (Tr. 577-581). Via her investigation, Ms. Bergman heard from Mr. Tremblay that he had no doubt Mr. Perez' comments were directed towards Mr. McSweeney and that they were extremely inflammatory. (Tr. 581). Roberth Ramirez, one of General Counsel's witnesses, lied during the investigation on behalf of Mr. Perez stating that he did not think the comments were directed to Mr. McSweeney but rather toward a Bob from a different job that Mr. Perez had. (Tr. 483-485, 582). At the trial, Mr. Ramirez admitted on cross-examination at the Hearing that he lied at Mr. Perez's behest. (Tr. 483-485).

Esther Martinez was also interviewed by Ms. Bergman and she too lied about Mr. Perez. (Tr. 548, 582). Her dishonesty was confirmed by Ms. Martinez herself as she admitted during the Hearing that Mr. Perez asked her to lie and that she did so. (Tr. 548). Endy Lora, another of General Counsel's witnesses, also lied during the investigation. Although Ms. Bergman had already heard from Mr. McSweeney that he did approach Mr. Lora, Mr. Perez and Ms. Gonzalez and told them to "spread out" during the October 25th event, Mr. Lora said that no exchange occurred. (Tr. 582).

3. The Termination

a. Factual Conclusions

After finishing all the interviews, there were several facts that Ms. Bergman was able to ascertain and base her decision on:

1. At around 7:00 p.m., Mr. McSweeney approached and instructed several workers, including Mr. Perez, to "spread out" at the Andrew Glover event on October 25, 2011.
2. Approximately 45 minutes later, Mr. Perez posted his vile comments on his public Facebook page.
3. Mr. Perez, when confronted with the obvious evidence, lied on multiple occasions to Pier Sixty management regarding the posting.
4. No witness interviewed offered any information regarding inappropriate conduct or an unfair directive by Mr. McSweeney or any other manager which precipitated Mr. Perez's Facebook posting.

b. Perez's Prior Disciplinary Record

Ms. Bergman also looked at Mr. Perez's personnel file before rendering her decision on the appropriate discipline. It is of some significance that Mr. Perez received written warnings for just the type of problems that occurred on October 25, 2011 but well pre-dated any union activity.

GC Ex. 6 is an Associate Counseling form issued to Mr. Perez in March 2011. (Tr. 43-44). His offense on that occasion was that a manager approached him and observed his chatting with another associate for more than a reasonable amount of time and he needed to get back to work. Id. The document also said Mr. Perez was "not performing job duties due to conversing on the floor during service." Id. The warning made clear that this was not the only time Mr. Perez had been addressed for his distraction from performing work by stating "he had been made aware of tendency to excessively chat with his co-workers while on the floor." Id. Mr. Perez refused to sign the March 2011 warning but did not deny receiving it. Id. He stated that he refused to sign it because he believed the Company exaggerated his failings. (Tr. 243).

Mr. Perez also received a performance evaluation (GC Ex. 7) dated February 15, 2010. (Tr. 244). It cited his lack of productivity due to "excessive chatting with fellow associates on the floor when doing assignments or during set up." (Tr. 245; GC Ex. 7). Mr. Perez also refused to sign this document, again asserting that this criticism was "exaggerated." Id. Significantly, there was no testimony offered by Mr. Perez (or any witnesses for the General Counsel) that when he received his negative written performance evaluation in 2010 or written warning in early 2011 that Mr. Perez found these formal admonishments so provocative that they inspired him to engage in posting vile comments about the Pier Sixty managers or supervisors

who issued them. Indeed, at that time, his only reaction was to not sign the documents. (Tr. 243-246; GC Ex. 6 & 7).

c. The Decision

Based on all facts and circumstances she gleaned through the investigation, Ms. Bergman ultimately decided to terminate Mr. Perez. (Tr. 585-586). Her rationale was straight-forward - - his comments were so vile, despicable, insubordinate and unrelated to any workplace issue that they could not be tolerated. Id. Not only had he used highly inappropriate language directed against Mr. McSweeney, but he also extended his vitriol to Mr. McSweeney's mother and his family. (Tr. 589). It was equally clear that this posting had become well-known throughout the Pier Sixty community almost immediately upon Mr. Perez putting it on his public Facebook page. Id. Thus, this was not a mere comment from one employee to another whispered in the corner at the water cooler. Rather, it was literally a world-wide broadcast designed to humiliate and undermine a significant manager at Pier Sixty and could not be tolerated. (Tr. 585-589).

C. Mr. Perez's Posting Does Not Constitute Protected Concerted Activity Under The National Labor Relations Act

It is certainly well-established that not all concerted activity is protected. In reviewing Mr. Perez's posting on October 25th, it is hard to ascertain what protected, concerted conduct occurred. There is nothing within the posting which refers to any wage, hour or working condition as defined by the National Labor Relations Act. Mr. Perez did not complain about any items subject to the collective bargaining process or any Pier Sixty policy. Rather, Mr. Perez overtly engaged in a personal diatribe against one of his managers.

The Labor Board has found that mere on-line gripes by employees do not enjoy NLRA protection. More specifically in JT's Porch Saloon and Eatery Ltd., (NLRB Division of

Advice No. 13-CA-46689, July 7, 2011), a bartender had gone five years without a raise and alleged he was unfairly doing the work of waitresses without tips. He posted on Facebook that the customers were "rednecks" and hoped they choked on glass as they drove home drunk. Although he also had complained on Facebook about a policy at the organization that he thought "sucked", this was not sufficient to warrant NLRA protection.

Additionally, in Martin House (NLRB Division of Advice No. 34-CA-12950, July 19, 2011), an employee posted comments about her place of work being "spooky" and that she could not tell if residents of the healthcare facility she worked at were hearing voices. The Board concluded that although there was some mention of her workplace, this did not constitute activity that was an outgrowth of collective concerns.

Lastly in Wal-Mart (NLRB Division of Advice No. 17-CA-25030, July 19, 2011), an employee posted comments on Facebook stating "Wuck Falmart, I swear if this tyranny doesn't end in this store, they are about to get a wake-up call because lots are going to quit." Even though two co-workers responded to these comments including one stating "hang in there," this was not sufficient evidence that the Facebook communication constituted or grew out of NLRA-protected activity.

Mr. Perez's comments far exceed the offensiveness of that cited in JT's Porch Saloon, Martin House and Wal-Mart. As with those cases, there is no clearly identifiable protected concerted activity. The mere fact that he mentions a manager "not knowing how to talk to people" is not sufficient to identify a workplace condition. In the Wal-Mart case, the individual spoke to the "tyranny" of the workplace and the case was dismissed as not referencing a protected, concerted workplace issue. Similarly, in JT's Porch Saloon, the reference to a policy the individual thought "sucked" was not sufficient to bring his comments into the protected

concerted arena. Here, Mr. Perez references no policy, no specific wage or benefit that might implicate protected, concerted activity. On this basis, alone, the instant case should be dismissed.

The ALJ wrongly concluded that Mr. Perez's actions were "part of a sequence of events" involving employer protests about rude and demeaning behavior by Respondent's managers. ALJD at p. 28, Line 49-51. The ALJ bases this conclusion solely on employee complaints made almost six months earlier, (ALJD p. 29, Line 3-5) and McSweeney's dispersal of employees talking at work on two occasions neither of which resulted in any complaint of rude or belligerent behavior. ALJD p. 29, Line 13-15. While the ALJ concluded this link was "not unreasonable" she failed to identify why it was reasonable and credible. Accordingly, the ALJ should be reversed and the allegation dismissed.

D. The Employer's Termination Decision Fully Comports With The National Labor Relations Board's Decision In Atlantic Steel

The ALJ wrongly concluded the outrageous nature of Mr. Perez comments did not lose the protection of the Act. In Atlantic Steel, 245 NLRB 814 (1979), the National Labor Relations Board established four criteria for assessing whether an employee's activities may lose protection under the Act:

1. The place of the discussion;
2. The subject matter of the discussion;
3. The nature of the employee's outburst; and,
4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice.

The ALJ erroneously applied these criteria and wrongly concluded Mr. Perez was protected under the law.

1. **Mr. Perez's comments were broadcast to the entire Facebook world including all of Pier Sixty**

Mr. Perez's vile comments about Bob McSweeney were published on the public page of his Facebook account. (Tr. 569, 822). Mr. Perez argued on his direct and cross-examination that he had only published his comments to his co-workers and that he did not make his comments to Mr. McSweeney's face. (Tr. 316). The Labor Board in Starbucks Corporation, 354 NLRB 876 (2009), established that the location of offensive comments is not determinative, but rather the pertinent question is whether or not the comments were made in front of other employees regardless of whether those employees are on or off duty. 354 NLRB at 879. The Board further stated that one critical question is whether there is likelihood that other employees were exposed to the misconduct. Id. See, Postage Service, 350 NLRB 441, 459 (2007). The ALJ essentially ignored this precedent by concluding Mr. Perez's comment, since posted while on break and on the apron area immediately adjacent to the Pier Sixty building, did not immediately impact the work environment. ALJD p. 30, Lines 34-36, 39-42.

Mr. Perez admitted that he posted his comments on Facebook. (Tr. 208). He admitted ten co-workers from Pier Sixty had access to his Facebook page and were listed as "friends." (Tr. 215). He admitted he made his comments with absolute certainty that other Pier Sixty employees would be exposed to them since as Facebook friends, they automatically received his postings. (Tr. 208, 215). Thus, based solely on his own testimony, Mr. Perez admitted that his conduct falls within that proscribed by Starbucks and Postal Services.

Moreover, as the testimony from multiple witnesses indicated, co-workers commented on his posting, and the posting was well-known within the Pier Sixty community within 24 hours. (Tr. 569, 660, 772-773, 822). Even after having been chastised by some co-workers regarding the content, he did nothing to back down from those comments or (as he

claimed during his investigation interview with Ms. Bergman) to indicate that the comments did not refer to Bob McSweeney but to some other individual. (Tr. 575).

It is further important that Mr. Perez's comments were not limited to his world of 165 Facebook friends. Rather, as testified to by Ms. Bergman and Ms. Marciano, his comments were on his public page of Facebook available to anyone with a Facebook account. (Tr. 569, 822). Several managers who were not listed as Mr. Perez's friends testified that they were able to go on the public Facebook page, pull up Mr. Perez's name and find the comments immediately. (Tr. 822). In fact, that is how they obtained a copy of his Facebook page and printed it out. (Tr. 569; GC Ex. 5).

Indeed, Ms. Marciano was able to go on to Mr. Perez's Facebook account during the Hearing and still pull up his current comments to the broad public. (Tr. 823-825, 837). Thus, it was obvious that even as of November 20, 2012, a full year after the posting which led to his discharge, that Mr. Perez's account remained "public." Id.

The Board has consistently held that where an employee engages in indefensible or abusive conduct, his concerted activity loses protection. The ALJ ignored much of this precedent. The Board in Trus Joist MacMillan 341 NLRB 369, 370 (2004) said that both employers and employees have a shared interest in maintaining order in the workplace, and that a certain level of decorum is necessary in order for that to be accomplished. 341 NLRB at 371. Similarly, the Board concluded in Stanford Hotel, 344 NLRB 558 (2005), that when discussions take place in private, away from the normal work area and other employees, such that it causes no disruption to order or discipline, this may factor in favor of protection. 344 NLRB at 558. On this point, examining an employee's intent is considered. Id. In Trus Joist MacMillan the Board found no employer violation because the employee had instigated a meeting with the

manager with the express purpose of embarrassing the manager in front of other employees and managers. 341 NLRB at 370.

In the instant case, as firmly established by the facts, Mr. Perez acted specifically with the intent of holding Mr. McSweeney out to ridicule in front of the entire Pier Sixty (and Facebook) community. He initiated this dialogue and conducted it all alone - - there was no interaction with Mr. McSweeney whatsoever. The ALJ agreed on this front noting the Facebook comments were posted by Perez alone (ALJD p. 31, Lines 12-14) with the specific intent to reach out to co-workers so they would see it. ALJD p. 29, Lines 25-27. Thus, regarding criteria 1 of Atlantic Steel, "the place of the discussion," the ALJ incorrectly concluded that Mr. Perez limited his comments so that other employees were not exposed to his misconduct so as to preserve the supervisor's (Mr. McSweeney's) authority.

2. Mr. Perez's posting was not part of an ongoing dialogue

Atlantic Steel lists criteria 2 as the "subject matter of discussion," suggesting that some comments that take place in the midst of a conversation between a manager and an employee over working conditions might enjoy some protection. Here the ALJ has wrongful analyzed Board precedent to conclude that a 45-minute delay marks an ongoing dialogue. The ALJ cites no case law to support this new and expanded interpretation of criteria 2.

According to Mr. Perez's testimony and that of Evelyn Gonzales, Mr. McSweeney came over to the two of them (and several others) and told them to "spread out" twice within about thirty seconds. This occurred at 7:00 p.m. (Tr. 769). Both Ms. Gonzalez and Mr. Perez confirmed that immediately after this directive, Ms. Gonzalez and Mr. Perez spoke to each other noting that they were not happy with Mr. McSweeney's directive. (Tr. 85, 206). Ms. Gonzalez testified that she specifically told Mr. Perez that she would handle the

matter and that he need not get involved with it. (Tr. 85-87, 205). Ms. Gonzalez also testified that several minutes later she approached Mr. McSweeney to discuss the situation. (Tr. 85, 206, 770). As Ms. Gonzalez was dialoguing with Mr. McSweeney, Mr. Perez could see that discussion taking place. (Tr. 206). He did not go over and participate in the dialogue and he never went to see Mr. McSweeney individually about the situation. (Tr. 206-210). Rather, he continued to work. Id. At some time after Ms. Gonzalez concluded her conversation with Mr. McSweeney, she returned to her work area and she and Mr. Perez and others all continued to do their work. Id.

Approximately 20 to 25 minutes later, Mr. Perez asked to take a break. Id. The process of doing this requires that he go to one of the Captains and ask for permission and then take himself to an appropriate break area. Id. So, according to Mr. Perez, after he saw Ms. Gonzalez speak with Mr. McSweeney, he then attended to his table in the Navesink area. (Tr. 296). He ascertained that the guests at Table 25 were appropriately being attended to – that the drink orders and food – everything was "perfect." (Tr. 297). He then walked into the kitchen, which according to GC Ex. 4, is over 100 feet from the Navesink level. (Tr. 297). There he found one of the Captains and asked if he could take a break. He was granted the break. (Tr. 298). Mr. Perez then claims he went to the bathroom which required him to walk through the kitchen, passed the coffee set up area and through a door to go up a set of stairs. (Tr. 298-299). He admits that he spent at least 5 - 10 minutes in the bathroom. (Tr. 299). Mr. Perez admits that after leaving the bathroom, he went back down the stairs and went out into the loading dock area, and that is when he took his break, turned on his phone and entered his posting on his Facebook account. (Tr. 300).

While it was clear through Mr. Perez's testimony that he was attempting to minimize the amount of time between Mr. McSweeney telling him to "spread out" and his posting, GC Ex. 5 speaks for itself. Mr. Perez identifies that the directive from Mr. McSweeney occurred at approximately 7:00 p.m. (Tr. 201). GC Ex. 5 was printed out by Pier Sixty at 3:46 p.m. on October 26th - - the document indicates that the posting occurred "20 hours ago." By simple math, the posting took place at approximately 7:45 p.m. on October 25, 2011. Thus, 45 minutes had elapsed between the time Mr. McSweeney told Mr. Perez to "spread out" and his comments on Facebook. Thus, there was no ongoing dialogue between Mr. McSweeney and Mr. Perez when his posting occurred.

In summary, Mr. Perez had over 45 minutes to contemplate what he was saying. This is quite unlike cases where the employee's outburst was in immediate/contemporaneous response to action by a manager. See Plaza Auto Center, Inc. v. NLRB, 664 F.3d 286 (9th Circuit, 2011); DaimlerChrysler Corp., 344 NLRB 1324 (2005) (employee outburst in immediate retort or supervisor statement protected). Under Atlantic Steel, the employee cursed immediately in response to a supervisor's decision on an overtime issue. No delay took place between the supervisor's action and the employee's reaction. 245 NLRB at 814. This substantial delay between Mr. McSweeney's directive and Mr. Perez's post, coupled with the absence of any dialogue between the two, firmly establishes no protection exists for Mr. Perez under criteria 2 of Atlantic Steel and that the ALJ was wrong to conclude otherwise.

3. The nature of Mr. Perez's outburst is one which is not entitled to any protection under the law

Criteria 3 of Atlantic Steel anticipates that there may be some rough language that can occur in the workplace which is not so egregious as to remove it from protection under the Act. Mr. Perez can make no such claim. Here, we must reiterate the posting by Mr. Perez:

> "Bob is such a NASTY MOTHER-FUCKER Don't know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!! WHAT A LOSER!!!! Vote yes for the Union."

Dawn Bergman gave a clear-eyed explanation as to why Mr. Perez was fired for this egregious, insubordinate conduct. She stated:

> "Well I think there is a difference between you dropping something on your foot and you scream out shit, fuck, whatever word you chose to use. In this particular case, especially because it was a Facebook posting, and according to Mr. Perez, you know, he went to the break, went outside, logged onto Facebook, typed out the entire message, hit send, and the posting was up at least until I saw it, so the 20 hours, probably a little bit more. He never took it down. He, you know, until several days later, when he knew a lot of people had seen it. To me, that's just, you know, blatant being, you know, disrespectful, blatant. You know, this is a manager that you're talking about and having no regard for that this could be seen as hurtful. This could be seen as defamatory, all those things. So that to me is different than somebody, even in the heat of the moment saying, you know, what the hell are you doing or something like that. It was completely over the top. I mean he didn't just say Bob is a nasty mother fucker. He brought up his mother and his family and all those things. I mean those people don't work here so why are you bringing them up?" (Tr. 589-590).

It appears that the ALJ accepted General Counsel's defense of Mr. Perez's conduct based on portraying Pier Sixty's workplace environment as one in which vile language is typically directed at or between co-workers and managers. At best, Mr. Perez and other witnesses testified that there was one particular employee (Chef Phil) who would use the words "shit" and "fuck" on a regular basis when referring to inanimate objects, such as "What the fuck is this?" or "Where the fuck is that?" (Tr. 97-99, 234-237, 310, 367, 441-442, 529, 535). There was also a claim that Bob McSweeney on two occasions used the term "fuck" – once stating to staff "stop fucking around" and once saying "what the fuck were you thinking." (Tr. 242, 528). The ALJ recognized this type of dialogue was not personally directed at employees as individuals. ALJD p. 32, Lines 20, 31.

Indeed, General Counsel and its witnesses also failed to present any occasion when any vile commentary was directed towards an individual's mother or family. Finally, according to Ms. Bergman, Pier Sixty has disciplined employees due to inappropriate language where someone has simply become too comfortable using vulgar language, even when it was not directed towards an individual person. (Tr. 587).

On criteria 3, it is Atlantic Steel itself which establishes that Mr. Perez's conduct is not protected. In Atlantic Steel, the discharge of an employee was sustained when he said to another employee that a foreman was a "lying son-of-a-bitch," and that the foreman had told a "mother fucking lie" or was a "mother fucking liar." 245 NLRB at 814. This dialogue happened in front of only one other employee. It was directed solely against a low-level foreman and was related to an actual workplace issue regarding the assignment of overtime consistent with the parties' collective bargaining agreement. The Labor Board confirmed the employee's discharge and concurring Board Member Penello wrote that regardless of the potential concerted nature of the employee's concern over the overtime assignment, an employee's conduct may be become "so opprobrious" as to make (the employee) unfit for further employment. 245 NLRB at 817.

The Board has similarly ruled that an employee's vulgar, offensive and personal denigrating remarks can alone result in the loss of protection in Care Initiatives, Inc., 321 NLRB 144, 151 (1996). By example, in Stanford Hotel, an employee responded to a supervisor's repeated demands that he admit he was not covered under the collective bargaining agreement by calling his supervisor a "liar", a "bitch" and a "fucking son of a bitch." The Board concluded that the employee's obscene and offensive behavior favored loss of protection. 344 NLRB at 559. Similarly, in DaimlerChrysler Corp., 344 NLRB 1324 (2005), an employee who called a supervisor an "asshole" and stated "bullshit, I want this meeting now" and "fuck this shit", and

that he did not "have to put up with this bullshit" was insubordinate and profane, and this weighed against protection under the Act. 344 NLRB at 1328-29.

Both the Ninth Circuit and District of Columbia Circuit Courts have taken a similar position in regard to this most important third criteria established under Atlantic Steel. In Felix Industries, Inc. v. NLRB, 251 F.3d 1051 (D.C. Cir. 2001), an employee was supervised by a manager whose father was the president of the company. The employee (Yonta) in a telephone conversation with the owner's son told him he was "just a fucking kid" and "I don't have to listen to a fucking kid." Yonta then repeated these comments and was fired. While the ALJ in the underlying case determined Yonta lost protection due to his language, the Board overturned this decision. However, the D.C. Circuit overturned the Board by finding that although "Yonta's conduct consisted of a brief, verbal outburst of profane language unaccompanied by any threat or physical gesture of contact" that the lack of a threat of violence did not cause the statement to provide Yonta with protection. 251 F.3d at 1054. The Court reasoned "if an employee is fired for denouncing a supervisor in an obscene, personally denigrating or insubordinate terms – and Yonta managed all three with economy – then the nature of the outburst properly counted against according him the protection of the Act. 251 F.3rd at 1055.

The Ninth Circuit took a similar approach in overturning the Board in Plaza Auto Center, Inc. v. NLRB, 664 F.3d 286 (9th Cir., 2011). In that case, an employee at a meeting between a manager and multiple staff members lost his temper and began berating the manager in front of other co-workers, calling him a "fucking mother-fucker", a "fucking crook", and an "asshole." 664 F. 3rd at 290-291. The employee also told the manager he was stupid and that no one liked him, and that everyone talked behind his back. Id. The employee then stood up, told the manager that if he fired him, he would regret it. Id. The manager fired him. Id. The ALJ in

applying the Atlantic Steel criteria found the obscene remarks deprived the employee of the Act's protection. The Board overturned this decision, citing that the conduct was not so severe as to cause him his statutory protection. The Ninth Circuit overturned the Labor Board and remanded it back to the Board for further consideration because the Board had improperly added in a mandate that there actually be a threat of physical violence to lose statutory protection. 664 F.3d at 296. The Ninth Circuit determined that there was nothing within the Atlantic Steel decision or its progeny which required this heightened level of threatened violence in order to sustain the discharge. Id.

In the instant case, Mr. Perez used the magic words which were sufficient to uphold the discharge in Atlantic Steel -- he called Mr. McSweeney a "NASTY MOTHER FUCKER." Second, those insubordinate comments were directed towards Mr. McSweeney as a high-level executive in the organization (not just a mere foreman). But Mr. Perez did not stop there. His filthy comments were directed against Mr. McSweeney's mother and his family, using the same lightning rod derogatory terms saying, that Mr. McSweeney should "fuck his mother and fuck his whole family." Thus, Mr. Perez took three steps past the language which resulted in the sustained discharge in Atlantic Steel.

The ALJ inexplicably dismissed all these factors. The ALJ concluded without basis that the comments "did not involve insubordination" and that profanity was the norm at Pier Sixty. ALJD at p. 32. Lines 7-8, 34. This conclusion failed to recognize that discipline had issued for vulgar dialogue or that some tolerated language did not involve personal attacks. The ALJ also seemed to rely on one joking bilateral exchange between Mr. Giordano and another manager as establishing that vulgar, non-joking personalized attached were the norm. ALJD p.

32, Lines 31-34. Moreover, the ALJ failed to indicate why the Board precedent cited above was not considered or why it was not dispositive on the issue.

In sum, regarding criteria 3, Mr. Perez could not have used more offensive language than he did as directed towards Bob McSweeney personally and towards his mother and family. Moreover, the language clearly was insubordinate and designed to undermine Bob McSweeney's authority and credibility which the Board has held warrants a loss of the Act's protection in Trus Joist MacMillan, Care Initiatives, Stanford Hotel, and DaimlerChrysler Corp. Thus, the ALJ wrongly concluded that the nature of the outburst is one which might be excused under criteria 3 of Atlantic Steel.

4. The ALJ correctly concluded that Mr. Perez's outburst was not provoked by the Employer's behavior

Under criteria 4 of Atlantic Steel, the Labor Board reviews whether the outburst by an employee was provoked by an employer's unfair labor practice. The full definition of criteria 4 is important because the word "provoked" is modified by "unfair labor practice." There was no assertion in the record that Mr. McSweeney engaged in any unlawful behavior on October 25th which might have precipitated the posting. While the ALJ did reach the proper conclusion on criteria 4, she inexplicably suggests this factor only "weighs slightly" against protection for Perez. ALJD p. 34, Lines 5-6. The ALJ does not cite to any authority for the watered down view of criteria 4's impact on this case. Moreover, the ALJ wrongfully suggests that incidents from a month earlier, may have justified the outburst. ALJD p. 34, Line 24-26.

* * * * *

In summary, the ALJ wrongly applied criteria 1-3 of Atlantic Steel, failed to adhere to (or explain the departure from) Board precedent, and erroneously concluded Mr. Perez's actions were protected under the Act. The Board should reverse the ALJ's finding and conclusion on this issue and dismiss the allegations regarding Mr. Perez's termination.

POINT II

THE EMPLOYER LAWFULLY COMMUNICATED WITH ITS EMPLOYEES REGARDING THE UNION

Encompassed within the Amended Complaint and Notice of Hearing were thirteen (13) separate allegations that the Employer violated 8(a)(1) of the National Labor Relations Act. General Counsel utterly failed in meeting its burden in establishing that any statement by a supervisor or agent of Pier Sixty was unlawful. The ALJ agreed with the Employer regarding six allegations and dismissed them. On the remaining seven, the ALJD inexplicably credited General Counsel's witnesses in finding violations of the Act.

To assess 8(a)(1) allegations, the credibility of witnesses is most critical in determining if improper statements occurred. Simply put, the testimony elicited from General Counsel's witness on direct examination simply should not have been credited by the ALJ. As discussed more thoroughly below, General Counsel's witnesses took one of two approaches when testifying to the purported 8(a)(1) violations:

1. That despite attending lengthy meetings with the Employer discussing various issues regarding unionization, they could only remember discreet fragments of information which, if true, and standing alone, might constitute unlawful statements; or,

2. They would testify to purported stand-alone unlawful statements by the Employer on direct-examination, yet on cross-examination, suddenly recall all of the information surrounding the allegedly offensive comments which rendered the Employer's statements perfectly lawful.

In contrast to General Counsel's witnesses, the Employer's witnesses were able to recall with great clarity the full content and context of their presentations on the issue of unionization and in the course of discussing this, made only lawful statements.

A. The ALJ Wrongfully Determined That Doug Giordano Made Unlawful Statements Regarding the Loss Of Benefits and Job Loss

The Amended Complaint alleges in Paragraph 6(a), (b) and (c) that Doug Giordano, the then General Manager of Pier Sixty, threatened employees with: 1) the loss of the Employer's "open door policy" if they chose unionization; 2) with the loss of their current benefits if they to unionize; and, 3) with discharge if they were to choose unionization. (GC Ex. 1). None of these allegations were proven but only the first was dismissed.

1. There was no threat of loss of benefits by Giordano

General Counsel's witnesses were quite scattered in their recollections of any purported statement by Mr. Giordano regarding potential loss of benefits. Significantly, lead witness for the General Counsel, Evelyn Gonzalez, did not recall any statement by Mr. Giordano regarding a potential loss of benefits through the unionization process, despite indicating that she was present for virtually every meeting and was present for the meeting at which Mr. Giordano spoke. (Tr. 59-60, 110, 114). Despite Ms. Gonzalez failing to hear any threats from Mr. Giordano, Hernan Perez alleges Mr. Giordano stated that if the union won the election, employees would automatically lose benefits. (Tr. 179). Mr. Lora alleged that Mr. Giordano said that if the Union won, benefits would "start from scratch." (Tr. 340). Mr. Ramirez alleged that Mr. Giordano said employees would lose the 401(k), a gym subsidy and tuition reimbursement benefits. (Tr. 429). Finally, Esther Martinez claimed that Mr. Giordano said that health insurance would be lost if the union won the election. (Tr. 500). These assertions and the witnesses' extremely limited recollection of them, were exposed on cross-examination and fully contradicted by the far more clear and full recollections of the Respondent's witnesses.

First, the issue of negotiations was addressed at the meetings by Luisa Marciano – not Mr. Giordano. Ms. Marciano testified that she read directly from a speech. (Tr. 806, R Ex.

9). She made clear to all staff that she was reading the document because it was important information and she did not want to miss anything. Id. The document speaks for itself in laying out process of engaging good-faith negotiations and the risks for each individual who is part of that process. (R Ex. 9). Ms. Marciano indicated that throughout her conversation, she did not stray from that which she read. (Tr. 807-808). The content of R Ex. 9 is unrefuted – Ms. Marciano said that employees could stay the same, gain or lose through the good faith negotiation process and that no one could predict the outcome of them. (R Ex. 9). Consistent with her remarks, Ms. Marciano directed that two handouts be distributed to staff during the course of her speech. (Tr. 811). These handouts became part of the record as R Ex. 2 and 3 and also speak for themselves. They contain direct quotes from the National Labor Relations Board and a Federal Court regarding the risks of collective bargaining negotiations. Id.

Ms. Marciano also took questions at the end of her speech and recalled Mr. Perez asking if all current benefits at Pier Sixty were guaranteed. (Tr. 182, 811-812). Ms. Marciano replied that they were not guaranteed because nothing is guaranteed but that Pier Sixty had been providing its benefits for many, many years. Id. Ms. Marciano also conceded that current benefits could be taken away by Pier Sixty in the absence of a union, but that through good faith negotiations, there was also the risk that all benefits could stay or be changed. (Tr. 812).

On cross-examination Evelyn Gonzalez similarly recalled Ms. Marciano making her speech on negotiations, handing out the quotes in R. Exs. 2 and 3 and indicating that everything is on the table in negotiations and that it was a give and take process. (Tr. 123-125). Hernan Perez admitted that Pier Sixty's discussion on negotiations, including the statement that it was a "give and take process." (Tr. 179). He recalled Ms. Marciano reading from her papers and saying that you "could get more or less." (Tr. 254). Endy Lora recalled Ms. Marciano

reading from her papers and speaking to the fact that everything must be negotiated and that there were no guarantees. (Tr. 383-384). Even Mr. Ramirez, who had the sketchiest of recollections, did recall Ms. Marciano addressing this issue. (Tr. 469). Finally, Esther Martinez recalled Ms. Marciano saying that the Employer would negotiate with the Union, that it could take time and that there were no guarantees. (Tr. 542-543). She also remembered Ms. Marciano saying people could get less or more, through the process. (Tr. 545).

* * * * *

The credible testimony reveals that Mr. Giordano did not speak to the issue of collective bargaining negotiations. Rather, it was Ms. Marciano, in a very specific speech that she delivered word-for-word, along with handouts, who addressed the issue in full – she described the complete collective bargaining process, the time it might take, the issues to be covered, the potential to gain or lose through the process and the risks for all parties involved. Ms. Marciano could not have been more exacting in ensuring that she spoke to the issue in a lawful fashion. Significantly, on cross-examination, each of General Counsel's witnesses recalled her explaining the process, that she read from her script and that she consistently mentioned the "possibilities" on both the positive and negative side of the negotiation equation.

In the ALJD, the ALJ completed ignored the fact that it was Ms. Marciano, through prepared written remarks, who covered the negotiations issue. ALJD at p. 20. Moreover, the ALJ found General Counsel's witness a credible despite their myriad of contradictory and their conveniently limited recollections. ALJD at p. 20. Additionally, the ALJ dismissed the fact that Gonzalez, who the ALJ found most credible, did not recall any threats by Giordano. The ALJ relied only ancillary and for less credible witnesses in finding that a threat of loss was made by Giordano. (Tr. 59-60, 110, 114). The ALJ never resolve this grand conflict in

testimony between General Counsel's witnesses. Moreover, the ALJ credited their limited recollections despite a history of several of them being proven liars when investigated by Pier Sixty in the Perez investigation and before the Board. Accordingly, the General Counsel failed to meet his burden to establish that there was any discussion by Mr. Giordano in which employees were threatened with a loss of benefits through the negotiation process and the ALJ erred in confirming this allegation and this should be reversed.

2. General Counsel failed to establish that Giordano made any threat of job loss due to unionization

There was some testimony from General Counsel's witnesses that during one of the meetings, a question was posed by employee "Yamina" asking what would happen to employees of Pier Sixty if they chose not to join the union if the union was elected to represent the staff. (Tr. 61). A number of other General Counsel's witnesses recalled this question - - Evelyn Gonzalez (Tr. 61), Hernan Perez (Tr. 180), Endy Lora (Tr. 387) and Roberth Ramirez. (Tr. 426). Each of these witnesses then gave sketchy and contradictory accounts as to the answer Mr. Giordano gave on this issue. Ms. Gonzalez stated, "Doug says that these people, the will have to leave the job, even though they don't want to, but he will have to let them go." (Tr. 62). Mr. Lora remembered the question and answer quite differently. He recalled that there was discussion that employees might be forced to join the union and pay dues and fees as a result of a contract. (Tr. 340, 389). Despite the lack of coherence in General Counsel's witnesses testimony, and the clear record of Perez lying and advocating that others lie for him (including Ramirez who did so repeatedly) the ALJ credited them. ALJD at p. 20.

In contrast to these contradictory and murky recollections by General Counsel's witnesses, Luisa Marciano was adamant that she addressed this question specifically in the meeting. Ms. Marciano testified that she recalled the question by Yamina and that she

interrupted Doug Giordano to answer the question. (Tr. 818). In fact, she stated to staff that she was answering the question because it pertained to the issue of negotiations which was a topic she was covering. (Tr. 818-819). She then spoke to the entire group indicating that as to whether or not someone continued to work once the union won the election depended on what was negotiated in the contract. Id. She went onto state that if the contract included language requiring everyone to join the union, that they must indeed join or the union could ask to have the individual leave. Id. Ms. Marciano absolutely denies that Mr. Giordano ever said anything about an employee being fired solely because of the union prevailing in the election. Id.

* * * * *

In summary, there was no credible testimony supporting the claim that Mr. Giordano threatened the employees with discharge due to the union election. The ALJ improperly credited General Counsel's witnesses who could only recall flashes of information on the alleged threat with no statements alleged to have been made by Mr. Giordano. Equally important, the one witness who could remember the entire dialogue – Luisa Marciano – most fully and articulately testified that it was she who addressed the issue of the union shop, its legal mandates and the outcomes of negotiations which might require union membership or potential discharge under the contract.

Based on the foregoing, the ALJ's conclusion that Giordano made an unlawful threat of discharge must be reversed.

B. General Counsel Failed To Establish Any Unlawful Statements Made By Jeffrey Stillwell

Paragraphs 6(d) and (e) of the Amended Complaint and Notice of Hearing allege that Jeffrey Stillwell, the Director of Banquets, threatened employees with loss of specified benefits if they chose the union as their collective bargaining representative and threatened

employees with loss of business as well. General Counsel failed to present any credible evidence of these purported threats. Equally significant, Respondent, through the testimony of Jeffrey Stillwell, provided highly credible evidence that all of his comments were lawful. The ALJ dismissed the allegation that Stillwell threatened loss of benefits but wrongly sustained the loss of work allegation.

Jeffrey Stillwell is the Director of Banquet Services at Pier Sixty. He has responsibility for the "front of the house" which encompasses all staff who have direct contact with guests attending Pier Sixty events. (Tr. 699). The Banquet Managers at Pier Sixty – Bob McSweeney, Richard Martin, Paul Macias and Chris Martino all report to him. Id. Mr. Stillwell articulated the extreme need of cooperation between employees to accomplish the myriad of tasks required of them to prepare for an event and service customers throughout an affair. (Tr. 703-705). Mr. Stillwell testified to exact timing needed to hold a great event. He stated that for social events such as a wedding, there is no second chance, it must be done correctly that night or you have ruined this very special occasion for the guests. Id. He further expressed time and again that guests choose to hold events at Pier Sixty in great part because of the fabulous service the organization provides. Id.

Mr. Stillwell spoke at two meetings on the same day with staff very shortly before the election in late October 2011. His meetings were attended by Dawn Bergman as well. Ms. Bergman spoke first. (Tr. 707). She covered the election details and process of actually casting one's ballot. Id. When she finished, Mr. Stillwell spoke to the staff. He utilized notes for his discussion. (Tr. 708; R Ex. 7). He thanked the Pier Sixty staff for their continued great service during the election. (Tr. 709). He thanked them for not allowing the differences of opinions on the issue to interfere with customer service. (Tr. 729). He then went on to speak briefly about

the issue of negotiations, identifying that the process was give and take and that staff could get more, less or the same at the conclusion of good faith negotiations. (Tr. 709). Mr. Stillwell then expressed concern that from his experience in unionized environments, service can be impacted because of collective bargaining rules that might get established. (Tr. 709-710). He spoke to limitations on the tasks an employee might be allowed to perform. For instance, a Banquet Server might be restricted from moving a glass rack or providing a drink to a guest at a table to which they are not assigned. (Tr. 710). He was also concerned of hearing the phrase "that's not my job." Id. Mr. Stillwell indicated he thought that all these potential limitations could hurt customer service which he already explained was a key factor in how guests chose to come to Pier Sixty or return to it. (Tr. 709-711). Of great significance, he absolutely denied ever stating that if the union came in, that Pier Sixty would lose business. (Tr. 711).

General Counsel's witnesses on cross-examination confirmed the full context of Mr. Stillwell's words, even if they conveniently limited their recollections on direct-examination. By example, Evelyn Gonzalez stated brazenly that Mr. Stillwell said customers will leave if the union comes in. (Tr. 62-63). But on cross-examination she recalled that Mr. Stillwell discussed customer service and that there were potential work rules in a unionized environment which could restrict employees in performing certain tasks. (Tr. 118-119). Hernan Perez recalled Mr. Stillwell talking about glasses breaking and concern about whether an employee would be restricted from assisting and cleaning it up due to potential union work rule restrictions. (Tr. 266). He also remembered (on cross-examination) Mr. Stillwell talking about the competitive nature of their business and how customers selected places based on service. (Tr. 264). He also reflected that Mr. Stillwell felt that Pier Sixty was better than other catering facilities that are unionized. (Tr. 264).

Endy Lora similarly had a limited recollection on direct-examination but was more expansive on cross. He first recalled Mr. Stillwell simply saying that if staff cannot help each other with a union present, that service is affected and the organization would lose work. (Tr. 341-342). But on cross-examination, he recalled a much more extensive explanation by Mr. Stillwell about union rules and the concern about the ability to share work. (Tr. 391-393). He also recalled Mr. Stillwell discussing the concern over an employee using the phrase "that's not my job" and that this could hurt service which may result in the loss of customers. Id. Finally, Roberth Ramirez was customarily inconsistent by remaining untrue to both his direct testimony and his affidavit given to the Labor Board. Mr. Ramirez first stated on direct-examination that Jeff Stillwell indicated that if staff brought in a union, it would affect business. (Tr. 429). Then he recalled that Mr. Stillwell actually spoke more fully on the subject, that he was concerned that in a union environment staff might not be able to go the extra mile for clients if they did not have the right to do that work. (Tr. 429). On cross-examination, he admitted that Mr. Stillwell said that poor service could impact business – not that it would. (Tr. 470-471). Meanwhile, Mr. Ramirez also conceded on cross-examination that his affidavit as given to the Labor Board did not contain any assertion that Mr. Stillwell spoke about a loss of business attributable to unionization. (Tr. 469-470).

* * * * *

While General Counsel failed to meet its burden regarding the Stillwell allegations, the ALJ nonetheless found a violation. Only one witness testifying on these issues gave consistent, clear and full context recollection of the issues discussed by Mr. Stillwell – Mr. Stillwell himself. He spoke most particularly about the painstaking process of holding an event where all employees pitch in together in a virtual symphony to provide excellent service with

perfect timing. He spoke of his concern that in a unionized environment if work rule restrictions were put in place, that this could hurt both the timing of work performed and the ability of Pier Sixty employees to give the best service possible to guests. On cross-examination, General Counsel's witnesses could not help but confirm Mr. Stillwell's lawful presentation of his concerns. None could ultimately sustain their initial assertion that Mr. Stillwell drew any direct link between unionization or a loss of work or business for Pier Sixty. In contrast, they all confirmed Mr. Stillwell's concerns of a loss of service and that this could impact the choices of their customers.

The ALJ's rationale for finding a violation was based on her view that Mr. Stillwell's mention of the Union potentially seeking onerous work rules was akin to an unvarnished prediction that the Union would strike. ALJD at p. 25. The ALJ also found a violation based on the need for Stillwell to have an objective basis for stating customers would not return to Pier Sixty if it offered poor service. Id. As to the first conclusion, the ALJ is wholly misplaced in making the comparison. While Stillwell did speak to possible work rule requests by the Union, this is the same as an employer speaking to "possible" strikes – a classically lawful statement. On the second issue, there could be no more objectively true statement by a manager with 20 years' experience in the catering business that poor service will cause customers not to return.

Accordingly, the ALJ's finding against Pier Sixty regarding Mr. Stillwell's alleged threat of loss of business must be overturned.

C. The ALJ Wrongly Found Unlawful Statements Made By Richard Martin and/or Chris Martino.

Paragraphs 6(f) and 6(g) of the Amended Complaint and Notice of Hearing assert that Chris Martino threatened employees that collective bargaining would start at scratch if they

chose a Union, and that Richard Martin threatened that the Employer's open door policy would go away if the Union was elected. We address these two allegations together since they were alleged by only one witness (Roberth Ramirez) and in the context of one purported conversation between the three individuals.

Roberth Ramirez alleged that sometime in October, following a discussion held by the Employer on negotiations, Mr. Martin asked if he could speak with Mr. Ramirez regarding the meeting. (Tr. 434). He said Mr. Martin invited him to speak upstairs, and then asked him about his reaction to the meeting and if Mr. Martin had any questions regarding the unionization effort by the Evelyn Gonzalez Union. (Tr. 435). Mr. Ramirez purportedly stated that as a part-timer, he was concerned about his hours. Id. Mr. Ramirez then alleges that without any prompting, Mr. Martin stated that they could not speak like they were (one-on-one) if the Union came in, and that the open door policy would be taken away. (Tr. 436). Mr. Ramirez made this allegation consistent with his allegation regarding all other Pier Sixty managers in that whenever they mentioned the open door policy, they simply spoke to it as something that would go away if the union came in. (Tr. 466).

Mr. Ramirez also alleged that as his discussion with Mr. Martin was coming to a conclusion, Chris Martino walked by and joined the conversation. (Tr. 436). He alleges he asked Mr. Martino about his upcoming schedule. Id. Mr. Martino, who makes the schedule for Pier Sixty associates, purportedly said he was not sure about the next month's schedule and (according to Mr. Ramirez), further said "if the Union gets in, you start from scratch." Id. Mr. Ramirez does not recall anything else about his conversation with Mr. Martino, nor any pre-cursor or following dialogue to this alleged statement in regard to the negotiation process. (Tr. 434-436).

In contrast to Mr. Ramirez's typical testimony - - non-linear, filled with non-sequiturs, and completely lacking any context - - Mr. Martin testified most credibly about his one conversation with Mr. Ramirez. That conversation included his standard question to employees following a meeting held by the Employer - - asking the employee if they had any questions for him, and that he would be glad to get the answer to that question. (Tr. 693). He made no comment regarding the open door policy or its potential withdrawal. (Tr. 693). Richard Martin recalled no dialogue between him and Mr. Martinez in which Chris Martino joined or had any discussion regarding the union whatsoever. (Tr. 695). He similarly had no recollection of Mr. Ramirez's alleged comment by Mr. Martino about "starting from scratch" in regard to negotiation. Id. Mr. Martino also testified he had no recollection of seeing Mr. Martin in any dialogue with Mr. Ramirez about the union or participating in any such dialogue. (Tr. 736). Finally, he denied the allegation of ever speaking about the issue of negotiations with Mr. Ramirez. (Tr. 738).

As addressed previously, Mr. Ramirez simply cannot be credited. All his direct examination "recollections" somehow only encompass what might be viewed as improper statements, if they were actually made. On direct, Mr. Ramirez was incapable of recalling the full dialogue surrounding these purported unlawful statements. Additionally, he was unable to explain any logical context in which the dialogues may have occurred. By example, while alleging that Mr. Martin claimed that the open door policy would go away, he similarly alleged that all managers, when speaking on the open door policy, simply said it would go away if the union came in. (Tr. 466). This was in great contrast to the extensive testimony from many witnesses that the dialogue at each of the meetings held by the Employer's representatives addressed to the need for union representation to be present to discuss many, issues regarding

workplace concerns employees might have so as to comply with their right to representation. (Tr. 59, 111, 238, 426, 596-597).

Further impacting his credibility, to "support" other 8(a)(1) allegations, Mr. Ramirez alleged there were many Pier Sixty managers, when speaking to the issue of benefits, who stated that they (the benefits) would all simply be "taken away." (Tr. 467). He claimed the statements from managers, Jeff Stillwell, Jim Kirsch, Roland Betts, Doug Giordano and Luisa Marciano, about negotiations were identical and all threatened benefit loss. (Tr. 467). However, when confronted with his own affidavit, Mr. Ramirez was proven to be a liar -- that virtually each of his assertions about all the individuals named above were wrong and the ALJ agreed by dismissing alleged loss of benefit claims made against Stillwell, Kirsch, Betts and Marciano.

* * * * *

The Employer avers that any testimony by Mr. Ramirez cannot be credited. Mr. Ramirez proved time and again his willingness to lie on the stand (even when overtly caught in his lies) and lie to the Employer during the 2011 Perez investigation. While he would make overt allegations on direct examination, these allegations contradicted his affidavit given to the Labor Board and/or his admissions via cross-examination. The purported conversation he had with Mr. Martin and Mr. Martino was similar in character -- it had no logical base, he provided no context, and it was contradicted by the direct testimony of two credible Pier Sixty witnesses who denied ever making such statements.

The ALJ was certainly aware of Mr. Ramirez's dramatic shortcomings as a witness and acknowledged his contradictory testimony versus his affidavit. ALJD at p. 18. Despite this, the ALJ credited Ramirez regarding these allegations. The ALJ did not identify the

basis for this conclusion nor did the ALJ consider, like with much of Ramirez's testimony, that he simply made up/lied about these allegations.

For all the foregoing reasons, the ALJ wrongful found statements by Mr. Martino or Mr. Martino to be unlawful and should be reversed.

D. The ALJ Wrongfully Concluded That Bob McSweeney Disparately Applied A "No Talk" Rule To Discussions Regarding The Union On Or About October 9th And/Or October 20, 2011.

There was significant testimony from all witnesses that Banquet Servers and other employees assigned to a particular event at Pier Sixty would have an opportunity to talk amongst themselves when setting up for an event or when working with no guests present. (Tr. 66, 184-185, 347, 437, 504). There was a similar bulk of evidence that the Employer consistently held associates accountable when there was too much talking that interfered with the progress of work being done or when that talking took place while guests were present.

Perhaps the best evidence of both of these rules being enforced was the disciplinary action issued to Hernan Perez over the course of his employment, but pre-dating the filing of the Petition for Election on September 22, 2011. As discussed in Point I(B)(3) above, Mr. Perez received a negative evaluation in 2010 and a written warning in March 2011. (GC Exs. 6 & 7). Each of these documents cited to his deficiencies as an employee for engaging in conversations with co-workers when he should have been working. Id. In his evaluation, under the section "Evaluation Criteria/Productivity", his manager wrote, regarding Mr. Perez, "Hernan produces the minimum volume of work required to do his assignments. His productivity has decreased over the past year. Part of lost productivity is due to excessive chatting with fellow associates on the floor when doing his assignments or during set-up. Not only does this make Hernan inefficient, but also slows down the productivity of the co-worker he is chatting with."

(GC Ex. 7). Similarly, the written warning Mr. Perez received identified an issue of him failing to follow the directive of his supervisor, and that same supervisor observing, "Hernan standing and talking to another associate. Paul exited the Ballroom and came back several minutes later and found Hernan still talking to the same associate, now standing behind the station and ignoring his assigned bussing duties. Paul approached Hernan and advised him that he observed chatting with the same associate for more than a reasonable amount of time, and that he needed to go back to his bussing duties." (GC Ex. 6). This warning also indicated that Mr. Perez had been spoken to on this very same issue on prior occasions on January 24, 2011 and December 4, 2010.

Another of General Counsel's witnesses, Esther Martinez, testified that she wrote in her affidavit given to the Board that "in the past, whenever Gonzalez, Perez, Lora, Vanessa Bauer, Ramirez or I gather together or with other employees on the floor to discuss personal matters during an event, McSweeney would tell us to get back to work in a calm manner as he walked by." (Tr. 556-558). She further confirmed that Mr. McSweeney gave these directives to discontinue talking prior to the Petition being filed by the Evelyn Gonzalez Union. (Tr. 556-558).

Paragraphs 7(a) and (b) of the Amended Complaint allege that Bob McSweeney inappropriately applied a no talking rule on or about October 9th and again on October 20th. It appears as though the October 9th event involved a discussion between Evelyn Gonzalez, Mr. Perez and Endy Lora in the Saugerties location - - one of the banquet rooms in the Lighthouse. (Tr. 69). Ms. Gonzalez testified that the three associates walked into the kitchen and were discussing an intended trip to Puerto Rico, and that suddenly Mr. McSweeney walked by and told them to "take your meeting outside." (Tr. 70). Significantly, Ms. Gonzalez conceded that

there were no ramifications for her or anyone else by virtue of this comment. (Tr. 70). In fact, she indicated to Mr. McSweeney that they were discussing a potential vacation to Puerto Rico and invited him (most sarcastically) to join them. (Tr. 71). Mr. McSweeney did not respond at all to the invitation and continued about his business. Id. Ms. Gonzalez did not receive any verbal counseling or notation of discussion to her file regarding this incident. (Tr. 70). There was no testimony from Mr. Perez or Mr. Lora indicating they received any verbal counseling or other disciplinary action by virtue of Mr. McSweeney's suggestion that they take their discussion outside. Basically, at worst, McSweeney gave a snippy retort to an obnoxious comment by a staff member.

The second purported disparate application of the no talking rule allegedly occurred on October 20th, but was no less innocuous. In that case, on or about October 20th, there was a group of employees talking together in the Olympic Room while setting up the buffets for an event. On this occasion, Ms. Gonzalez was speaking with Jonathan Rosario and with Danny (last name unknown). (Tr. 74). Ms. Gonzalez recalls Mr. McSweeney coming up to her and stopping at a close distance (perhaps an arms-length away) saying "break up the group – we don't want people talking in groups." (Tr. 74-75). Once again, neither Ms. Gonzalez nor the other associates who were participating in whatever dialogue may have been taking place received any formal admonishment, disciplinary action or counseling by virtue of this event. (Tr. 75).

Bob McSweeney testified as to these alleged innocuous events as best he could. His testimony openly reflected that he regularly and consistently reminds staff to get back to work and stop talking on an almost daily basis. (Tr. 764-765, 777). As the Banquet Manager for an event, and as discussed at length in Point I(B)(4)(a & b) above, Mr. McSweeney is entirely

responsible for the success of an event. This requires incredible attention to detail and tremendous timing in making sure that each task is done so that the next task can occur without interrupting the flow of a one-time event for the guests at Pier Sixty. (Tr. 777). To that end, Mr. McSweeney moves with great swiftness throughout the event location. (Tr. 763).

As to the alleged dialogues in the Saugerties Room on October 9th and Olympic Room on October 20th, Mr. McSweeney could not deny that he may have gone up to Ms. Gonzalez and other staff to tell them to get back to work. (Tr. 775). His recollection was not faulty, but rather reflected the regular nature of his directive to employees to stop talking. Id. When asked if he recalled telling the three associates to "take your meeting outside" or words to that effect, Mr. McSweeney answered candidly, "I don't recall that specifically...I'm constantly walking up to servers and associates and directing them, things like that." Id.

Mr. McSweeney similarly had no specific recollection of dialogue with Ms. Gonzalez or others about a trip to Puerto Rico. (Tr. 775-776). Again, it was Mr. McSweeney's testimony that he consistently addresses employees falling into groups and talking rather than being focused on their work. He stated, "I'm breaking up small groups huddled together on the floor having private conversations or conversing with each other in front of guests." (Tr. 777). Mr. McSweeney expressed his view on the issue well in stating,

> "You can't cover every rule, every day and every meeting, and we have 120, 130 servers. There might be a night where we have 50 servers from a temp agency. So we have a great many people. There are three other people that do what I do, so they don't all see me all the time, and I don't see them all the time, so things need to be repeated constantly."

(Tr. 778). Mr. McSweeney recalled giving this type of directive literally hundreds of times pre-petition and on many occasions throughout his years working as a manager at Pier Sixty. (Tr. 778).

Even General Counsel's witnesses admit that there are limits on the amount of talking that may take place in the workplace, and that Bob McSweeney and other managers consistently enforced the requirement that employees do not speak in front of guests. (Tr. 274, 395, 401, 477, 556). They also acknowledge that Mr. McSweeney, prior to the Petition being filed, would consistently come up to them and tell them to get back to work or disengage from talking. Id. Indeed, the one discharge discriminatee in the instant case, Hernan Perez, received multiple disciplinary actions for his constant talking with co-workers instead of being focused on his work. (GC Exs. 6 & 7). This discipline and his negative evaluation pre-dated the filing of the Petition.

Given the establishment of these facts, it was incumbent upon General Counsel to show some disparate application of the rules at Pier Sixty. This he could not do. Though citing to two occasions when Mr. McSweeney purportedly told employees to move their conversation outside or stop talking, for neither of the occasions did any Pier Sixty co-worker receive a disciplinary action. None received a verbal counseling. None received a negative evaluation, and none received a written warning. Indeed, given that Mr. Perez did receive written warnings in 2010 and 2011 for such offenses, it would appear that whatever dialogue Mr. McSweeney had post-Petition on October 9th and 20th reflected an even-handed application of Pier Sixty's policies on talking in the workplace and, if anything, a lesser enforcement than had occurred in Mr. Perez's history.

It appears that the ALJ, without foundation, determined the enforcement of Pier Sixty normal rules during the election period and against alleged union advocates was *de facto* unlawful. The ALJ failed to consider and acknowledge the prior enforcement of Pier Sixty's rules, including the significant and consistent discipline of Mr. Perez's pre-petition, as defeating the allegation of disparate application. Accordingly, the ALJ's ruling Paragraphs 7(a) and (b) should be reversed.

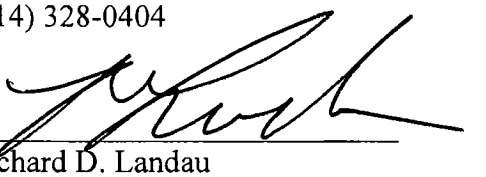
CONCLUSION

The credible testimony, Hearing Exhibits and Board precedent firmly establish that Hernan Perez was lawfully discharged. His unprovoked and unmatched reprehensible conduct was neither protected nor concerted under the Act. Even if arguably engaged in protected concerted activity, Mr. Perez lost protection under the law due to his extreme conduct. Thus, the ALJ's determination that his discharge was unlawful must be reversed and the allegation dismissed.

Regarding the 8(a)(1) allegations which were sustained by the ALJ (seven in total), the General Counsel's inability to obtain credible or complete testimony from its own witnesses standing alone rendered all the allegations worthy of immediate dismissal. Thus, the ALJ's findings and conclusionary to the contrary are erroneous. The credible, consistent and complete testimony of the Employer's witnesses evidencing their lawful statements compels the reversal of the ALJ's finding of violations and dismissal of all the 8(a)(1) allegations.

Respectfully submitted,

JACKSON LEWIS LLP
Attorneys for Respondent
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

By: 
Richard D. Landau

Dated: June 14, 2013
White Plains, New York

4851-9016-6036, v. 1

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 2

PIER SIXTY, LLC,	:	
	:	
Respondent,	:	**CASE NOS. 2-CA-068612**
	:	**2-CA-070797**
AND	:	
	:	
HERNAN PEREZ, an Individual	:	
EVELYN GONZALEZ, an Individual	:	
	:	
Charging Parties.	:	

CERTIFICATE OF SERVICE

A copy of Respondent's Brief In Support Of Its Exceptions To The Decision Of The Administrative Law Judge has been duly served this day via Federal Express to:

Eric Brooks, Esq.
General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104

The Honorable Joel P. Biblowitz
Associate Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
120 West 45th Street, 11th Floor
New York, New York 10036-5503

The Honorable Lauren Esposito
Administrative Law Judge
National Labor Relations Board
Division of Judges
120 West 45th Street, 11th Floor
New York, New York 10036-5503

Mr. Hernan Perez
23 Devonshire Drive
Clifton, New Jersey 07013

Ms. Evelyn Gonzalez
935 St. Nicholas Avenue, Apt. 5J
New York, New York 10032

Michael L. Abitabilo

Dated: June 14, 2013
White Plains, New York

4817-0063-6180, v. 1